BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I
OPINIONS OF COURT BELOW

The prevailing and dissenting opinions of the Circuit Court of Appeals, the first dated January 17, 1941, and the second dated March 31, 1941, will be found (R. 125 and 137) and are reported in 118 F. (2d) 836.

II
STATEMENT OF CASE

This statement appears pages 1 to 8 of this petition and brief and will not be repeated.

III
ARGUMENT

1

The first point for discussion here is that it was error for the Circuit Court to sustain the trial court in admitting the testimony of Instructor Howell (R. 49) and Dr. Quinn (R. 59) on behalf of plaintiff to prove how petitioner should have conducted its chemical laboratory.

To permit the courts to relax the rule of evidence so as to give probative force to evidence of this kind leaves parties accused of negligence without the righteous protection accorded them under the reasoning of the courts throughout the years.

To exemplify the error complained of we herewith submit brief excerpts from the evidence of each witness.

Counsel for respondent submitted to Instructor Howell the following question:

"Q. Then Mr. Howell I will hand you that experiment No. 11 and ask you to outline to us the manner in which that experiment should in your opinion be carried out, including in your explanation as to how it should be carried out, the manner in which, if any, it should be supervised" (R. 50).

Objection was made to the question and some argument followed, during which the court said:

"I will let him answer the question within the limits I have designated, *how he has it* (the work) *done in his school*" (R. 51).

Over our further objection to all such evidence the court permitted the witness to give a description of his laboratory, the number of students he had in each class, their ages, and innumerable other facts which could not do other than confuse the jury and injure petitioner's cause (R. 53-7).

Dr. Quinn was asked the following question and over our objection was permitted to testify in part to the following facts, which we condense here to save time and space:

"Q. In explaining, in telling us how that experiment is performed and the supervision given, will you explain to us and tell us in what manner and under what circumstances that experiment is performed, and you might include in that the use of what equipment and the use of what chemical substances, and I might incidentally direct your attention to the equipment here that is upon the table and if it will help you in explaining that to refer to that equipment, you may do so."

"In this course we have 401 students divided into five sections. I have two or three assistants. They (the students) are not permitted to work in pairs. The student starts in with the first part, where it says the preparation of oxygen. He will mix his potassium chlorate with the manganese dioxide or the ferric chloride similar to this experiment, place it in the test tube and start heating it, collecting the oxygen in a bottle very similar to the one on exhibit here. This experiment takes approximately

three hours to complete it, for the average student. We circulate among the desks—around the desks, answer questions that they may ask, watch them to see that they set up the apparatus as directed, and see that they write their notes up when they finish the experiment" (R. 59-60).

Nowhere in the questioning of these two witnesses was any attempt made to prove a general custom or common practice against which to judge the conduct of Dr. Johansen. The entire line of evidence is limited to showing what each did under the circumstances and conditions existing in his department. The evidence introduced on this point all goes to show very fundamental differences existing in the operation and conduct of the three laboratories. Certainly the admission of such evidence was wrong because it could do nothing more than confuse and mislead the jury to the petitioner's injury.

This is clearly illustrated and held by the following cases:

In *Garthe v. Ruppert*, (N. Y.) 190 N. E. 643, dealing with a very similar situation, the court in reversing a judgment for plaintiff said and held:

> "The plaintiff proved, over objection and exception, that in another brewery the work was done in a better way than by Ruppert. * * * It was reasoned by the plaintiff that if other breweries could do this, then Ruppert should have done it. Such evidence is incompetent to prove negligence. * * * When, however, a custom has prevailed in the trade or in the calling, or certain dangers have been removed by a customary way of doing things safely, this custom may be proved to show that a manufacturer or any one else employing men has fallen below the required standard. *Never, however, has it been permitted to take one or two instances as a gauge or guide in place of the custom of the trade.* * * *
>
> *"What some other brewery did might have been better and safer than the ways of Ruppert, but there was no attempt to prove that what the other brewery or brew-*

eries did or had was the practice or custom or general usage in the business. For this reason it was incompetent."

Stocker v. Boston & M. R. R., (N. H.) 143 Atl. 68.
National Pressure Cooker Co. v. Stroeter (7th C. C. A.) 50 F. (2d) 642; Certiorari denied 284 U. S. 674-76 L. Ed. 570.
Carroll v. Central Counties Gas Co., 273 P. 875.
McClellan v. Pennsylvania R. Co. (2d C. C. A.) 62 F. (2d) 61.

2

The second point we make is that the instruction of the court as to this evidence only added to the confusion created by the evidence.

The instruction reads as follows:

> "THE COURT: I will reframe it, and say to the jury now, that the usual practice in other universities in respect to this or similar experiments in respect to supervision may be considered by you in determining whether or not Dr. Johansen exercised due and reasonable care in this particular instance. Such practice would not be conclusive, but it is a matter under all the circumstances of the case that you may take into consideration (R. 8, 112)."

An analysis of the instruction develops this:

In the first place, there was no evidence as to what was "the usual practice" for the conduct of a laboratory such as the one under the direction of Dr. Johansen. In the second place, there was no evidence as to what "the usual practice" was "in other universities."

To instruct the jury in such terms only the more impressed upon them the evidence which was so erroneously received and gave to it a probative force which was entirely unwarranted. In *Hough v. Stone* (Oh. 1925), 153 N. E. 313, the court said:

> "The Charge with Reference to Custom.
> "We think it was proper in this case to submit to

> the jury, if the evidence warranted it, the question whether or not there was a custom, certain, uniform, and generally acquiesced in in the neighborhood where the farm in question was located, as to the number of crates to be used for harvesting onions. *Lowe v. Lehman*, 15 Ohio St. 179. *The record in this case, however, discloses not only that there was a lack of proof as to the certainty, uniformity and generality of the custom in the neighborhood, but also that these elements were wholly overlooked in the charge of the court to the jury. There must not only be some evidence in the record as to all the elements requisite to constitute a valid custom, but those elements should also be clarified and explained in the charge to the jury.* We are therefore of the opinion that the court erred in its charge to the jury in respect to custom."

The Circuit Court in the majority opinion after a strained effort to justify the admission of the evidence and the giving of the instruction in question, finally in the third paragraph (R. 131) confesses, we think, that it is out of bounds, by saying:

> "It is generally conceded that the trial court in the exercise of its discretion is more competent to judge the exigencies of the particular case. The discretion of the trial court, when exercised within normal limits should not be disturbed. In our view, it revolves itself into essentially a practical problem *and is a concession to the purely unscientific philosophy of the law.*"

In other words, regardless of the law as cited by petitioner herein and the facts, still the court by "concession to the purely unscientific philosophy of the law" in effect says:

> "There is no law except as each court in each separate case before it may determine and declare what the court in the particular case desires the law to be."

Our position is that a review of this case is necessary to remedy what is here pronounced by the court.

3

Our third point is that petitioner at the trial was entitled to a directed verdict on the state of the record because:

(a) Respondent failed to prove any negligence as set out in her complaint.

Paragraph VII (R. 13) contained the allegations of negligence relied upon by plaintiff.

When reduced to what is really alleged it can be at most the following:

(1) That the petitioner was negligent in that, *knowing respondent to be inexperienced in chemistry, it did not warn* her of the fact that the chemicals to be used in Exercise No. 11 were highly dangerous and likely to explode with great force.

(2) That the University did not supply proper or any supervision in that Dr. Johansen left the laboratory while the respondent was there engaged in the performance of Exercise No. 11.

Judge Johnson (the trial judge) limited the allegation even more. After reading paragraph VII to the jury he said:

> "The gist of the paragraph of the complaint as I have read it to you is the charge that the defendant was negligent in failing to have its teachers or instructors, specifically Dr. Johansen, properly supervise, as plaintiff alleges, the experiment as it was being then conducted by the plaintiff and the two other girls associated with her" (R. 103).

Again to the same effect he stated the issue: (Was) "Dr. Johansen negligent in not remaining in the laboratory and overlooking the activities of the young women in the preparation for and conduct of this experiment?" (R. 105).

It is our position that Judge Johnson was right in treating the recording as failing to prove that petitioner knew respondent to be inexperienced in chemistry, and that knowing such facts it failed to warn her that the chemicals * * * were highly dangerous and likely to explode with great force.

So it is our further position that the majority opinion of the

Circuit Court is entirely wrong when it states (First Parag. R. 132):

> "The defendant undertook to instruct the plaintiff in a course of study, which involved the performance of certain experiments; *that they were hazardous and dangerous to one not learned in the science of their performance is evidenced by the result. That the plaintiff was not learned is inherent in her status as a student.* Therefore, it became the duty of the defendant to furnish instruction and supervision, and that degree of supervision is measured in quality by what an ordinary institution of this type *would* have furnished under the same or similar circumstances."

(1) Our first objection to this goes to that part of the paragraph which says: "That they (the experiments) were hazardous and dangerous to one not learned in the science of their performance is evidenced by the result."

(2) Our second objection to the court's statement is: "That the plaintiff was not learned is inherent in her status as a student."

We will consider the second statement first. Plaintiff in age and general experience was above hundreds of thousands of high school students doing this work in high schools, of which fact this court should take judicial notice. In the field of chemistry she had had much more experience than the innumerable high school students mentioned above as well as university students throughout the land, doing the same work, without accident. Isn't it more logical to say this is conclusive proof that the experiments were not dangerous? The evidence shows she had also trained in the scientific processes in physics, and yet as conclusive proof that "the plaintiff was not learned," the court says, "is inherent in her status as a student." It appears that finding no support in the evidence as set out in the record to sustain a point the court desired to make, it resorted to some unwarranted conclusions. Does it follow that an Einstein is not learned in the law of relativity

because he is a student in that field? Can the court say that a boy aspiring to be an aviator, who has passed his tests in the C. A. A., along with his army tests, and has been accepted by the army air corps, is not learned in aviation because there is so much more that he must learn and because later in his work he "cracks up"? Tested by educational endeavor or the desire to achieve in any walk of life the statement just does not fit in as a true conclusion. Isn't the fairer and more logical presumption rather, that with respondent's background and her study of this very experiment (R. 47-48) she did know something about it and was at the time engaged in demonstrating what she knew?

Now returning to point (1) above, that the experiment "to one not learned (one of which respondent was not) was hazardous and dangerous is evidenced by the result," it is our first position that that is the same argument that the happening of an accident is evidence of negligence. According to all the legal authorities for all time, negligence is never presumed from the fact of an accident, but must be affirmatively proved.

> *Phil. & R. Ry. Co. v. Thirouin* (C. C. A. 3d) 9 F. (2d) 856.

There is no evidence in this case to prove that the experiment was "hazardous and dangerous." The issue was not even made by the pleadings. The court resorts to the explosion, which it calls the "result" to prove that the experiment was hazardous and dangerous. The "result" did not come from the experiment as outlined and read by the respondent and her companion students. It came from the doing of an act by the respondent and her companions absolutely outside the experiment and which the Circuit Court designates as a mistake proximately causing the explosion. (Court's op. last line R. 132) The court can take judicial notice of the fact that chlorate is not in and of itself dangerous or working with it hazardous; that ferric oxide is not dangerous in any respect, either by itself or combined with any other element in-

volved here; that the two mixed together and heated are absolutely harmless, as is the oxygen that is generated; that collecting oxygen in a bottle is not dangerous; that phosphorus is not in and of itself dangerous, nor is it dangerous when made to burn by the application of a match, nor is it dangerous or hazardous to insert the lighted phosphorus into a bottle of oxygen. That being true, the experiment in the hands of one without any learning when carried through as outlined is not dangerous or hazardous.

We have been unable to find a case involving similar facts, but present the following cases as proof conclusive that the court is wrong in its conclusions herein set out.

In the case of *Gallenkamp v. Garvin Mach. Co.* (*N. Y.*) 99 *N. E.* 718, it was argued that a machine with a conveyor belt on it was dangerous and therefore the defendant was liable to one injured in operating the machine. In answer the court said:

> "Thus from the plaintiff's evidence it appeared that this conveyor was perfectly safe so long as a person using it did not place some portion of his body inside of the shaft between the pans, and keep it there for a sufficient length of time to allow the succeeding pans to strike him. It seems to me clear that this was not a dangerous machine as distinguished from an ordinary elevator or other moving machine used in a factory. The knowledge required to safely operate it was only that common knowledge that every one has in using machinery at all. Nothing was required for perfect safety except to keep out of the shaft. * * * "

In our case the experiment "was perfectly safe so long as a person" performing it followed the manual. The knowledge required to safely "perform the experiment" was only that knowledge common to high school and beginning university students.

In *Capps v. Carpenter* (Kan.) 283 P. 655, it was contended by the plaintiff that an "air gun" in the hands of a small boy was a dangerous instrument. In answering the court said not.

Applying the same reasoning to the experiment, it was always the same whether in the hands of Dr. Johansen or the girls. It was to be performed in exactly the same way without possible harm to anyone.

The cause of the accident was that the girls, through not paying proper attention to the directions concerning the experiment, put phosphorus, a test material to be used only after the oxygen had been generated and collected in a bottle, into the generating tube already containing chlorate and applied the heat.

In *Ford v. Coml. Motor Freight* (Ohio) 14 N. E. (2d) 354-357, the court clearly sets out the law applicable to the case at bar.

> "The work of conveying coils of wire across a sidewalk and depositing them in the adjoining building was proper and contained no elements of unusual danger to anyone. Whatever danger developed resulted from the manner in which those engaged did it and their failure to exercise care while so engaged. If it can be said that delivering a roll of ordinary wire is inherently dangerous, it would be difficult to conceive of any human activity that could not be so characterized with equal regard to realities."

See also *Gulland v. Northern C. & D. Co.* (Wis.) 132 N. W. 755-756.

So, in conclusion we say respondent's "status as a student" does not establish inherently that she "was not learned" and that that in turn proved conclusively that she was inexperienced and therefore not accountable for her mistake. And further, we say that the "result" does not evidence that the experiment was hazardous and dangerous, nor do the pleadings or the evidence give basis for any such conclusion.

(b) Respondent failed to prove any negligence on the part of petitioner that proximately caused the accident.

Back to Judge Johnson's question (R. 105): (Was) "Dr. Johansen negligent in not remaining in the laboratory."

There is no proof that he was. Dr. Quinn said:

> "It would be quite difficult to observe as to whether or not they were using or not using the proper chemical materials as the student proceeds."

Miss Kay testified:

> "When in the laboratory he (Dr. Johansen) would walk around; if we wanted special attention we would call for him to come and help us. That was the case when he was helping us before the regular class came. When the regular class was on he would only be with us at such times as we might ask for his attention particularly and all the rest of the period he might have been with other people the distance of the laboratory away from us. I didn't keep track as to how long he was with us in performing Exercise No. 10. I think he would come and help us and then walk away, then we would come and have him help us again when we were further along. He was with us just those times when we would call for him to come and see us" (R. 37-38).
>
> "After we had mixed the chemicals we were hesitant about applying the Bunsen burner and I expressed some doubt to the girls about doing so as I had never taken any chemistry before and I always had a fear of using the Bunsen burner and the chemicals in the laboratory. I was hesitant at this particular time, just as I was about other experiments, and I said to the other girls 'I wonder if it is all right. I don't like to put the burner there.' One or both of the girls urged me to go ahead. I don't remember whether it was one or both. It might be either one or both of them" (R. 39).

Respondent on the same point said she and her companions "could have waited until he (Dr. Johansen) came back but to the best of my knowledge it was all right" (R. 48). It must follow

that if Dr. Johansen had been in the room he would not have been called to prevent this explosion.

The case as we view it falls exactly within the facts and the law as set out and declared by Judge Cardozo in *Hamburger v. Cornell University,* (N. Y.) 148 N. E. 539, 42 A. L. R. 955-963. In that case the plaintiff, a student at the University, was assigned to perform two experiments at one particular laboratory period both of which, as in our case, involved the use of potassium chlorate with another chemical. The first experiment was performed without accident. In the performance of the second experiment plaintiff used a wrong chemical and an explosion occurred, as a result of which the plaintiff lost an eye. In this case the decision in favor of the University went off on the ground that it was exempt from liability because of being an eleemosynary institution. However, in discussing the negligence point, the court said:

> "In the absence of any evidence of some defect in the mercuric sulphide, the key to the explosion would seem to be in the presence of the potassium chlorate. *If the plaintiff took this out of a bottle properly labeled when she should have taken lime from another bottle, the explosion was her own fault, and so the court charged.* If her recollection is accurate that she used a bottle labeled lime, then, since no lime was found upon her desk, the inference may be drawn that, through the fault of an instructor, the bottle was mislabeled. For some reason, the trial judge discarded this theory of negligence, and declined, with the plaintiff's acquiescence, to submit it to the jury. We may doubt whether other negligence is chargeable to anyone. For the purpose of this appeal, we assume that the plaintiff is not barred by the theory of the trial from sustaining a denial of the motion for the dismissal of the complaint upon any theory now shown to be supported by the evidence. She gains nothing from the assumption. *The difficulty remains that only conjecture or suspicion can impute negligence to any one except in circumstances relieving the university of liability for the wrong of the delinquent.*"

In our case there is no evidence that there was any wrong labeling. To say that the accident was caused in any other way than that the girls wrongly mixed phosphorus, which they themselves labeled, with potassium chlorate taken from a bottle properly labeled is to require one to conjecture a set of facts not warranted by the evidence. The following cases hold against submitting such a case to the jury:

Quinn v. Utah Gas & Coke Co. (1912) 42 Utah 113, 129 P. 362.
Busse v. Murray Meat & Livestock Co. (1915) 45 Utah 596, 147 P. 626.
Tremelling v. Southern Pac. Co. (1917) 51 Utah 189, 170 P. 80.
Fee's Admrx. v. Mahan-Ellison Coal Corp. (Ky. 1931) 43 S. W. (2d) 681.
F. W. Woolworth v. Davis (C. C. A. 10th) 41 F. (2d) 342.
Watkins v. Piggly Wiggly Bird Co. (C. C. A. 8th) 31 F. (2d) 889.
Steggell v. Salt Lake & U. R. Co., 50 Utah 139, 167 P. 237, 240.
Bullock v. Luke et al, 98 Ut. 501, 98 P. (2d) 350.
Skelly Oil Co. v. Chambers (C. C. A. 10th) 87 F. (2d) 853.

(c) Respondent proved affirmatively that she was guilty of negligence that proximately contributed to the accident and the jury so found (R. 27, question and answer No. 7).

See evidence submitted B 22.

In the opinion of the majority of the Circuit Court a violent assumption is made and stated "that Dr. Johansen instructed the plaintiff and others to proceed to perform a dangerous experiment"* * * (Line 11—Second Parag.) (R. 132). There is nothing in this record to sustain such a statement.

Again the opinion sets out (Line 2 R. 133):

> "Although there appears to be some inconsistency in the answers made to the interrogatories the jury did find in answer to an interrogatory that assuming a mistake was made in mixing red phosphorus and potassium chlorate, that such mistake was caused by the failure of Dr. Johansen to use reasonable and ordinary care in supervising the performance of the experiment, which *in effect reaches the conclusion that those performing the experiment, including plaintiff, did make a mistake and that the mistake proximately caused the explosion, but the failure of the defendant to properly supervise, proximately caused the mistake.*"

In analyzing this proposition it seems to us the following is the result:

1. That Dr. Johansen's failure to use ordinary and reasonable care in supervising caused the mistake.
2. That the girls, including plaintiff, in proceeding with the experiment negligently made a mistake, and that the mistake proximately caused the explosion.

The first thing that strikes us about such a proposition is this: How can it be said Dr. Johansen caused the mistake when,

1. The girls say they only called the Doctor when they needed him to explain something (R. 37-38).
2. That at the time in question here they were sure they didn't need him and didn't even think of calling him or waiting for him even though one of the girls was hesitant about going forward, and
3. When Dr. Quinn's testimony is that even if Dr. Johansen were in the room it isn't likely he would have observed that the girls were using the wrong chemical?

The second thing that strikes us about such a proposition is this: Following the logic presented by the court there would

never be a case of contributory negligence, because it could always be said that while the second party made a mistake, the first party caused the mistake. The girls knew Dr. Johansen was out of the room; they had the caution that very afternoon to be careful about the use of chlorate; there was the feeling of one of them that they should wait; the fact that the Doctor was out of the room would never have caused an explosion; the affirmative, active cause was the girls actually mixing phosphorus with chlorate and applying the heat. Don't such facts create a duty on the girls to determine their course, the breach of which admittedly resulted in a mistake and the explosion? If that be true that was the negligence which, the jury said, proximately caused the explosion. The jury so found in answer to question No. 7.

The law of Utah is that where an accident is caused by the negligence of one party, but the undisputed evidence establishes that the cause thereof is proximately contributed to by the other party to the accident the second party as a matter of law cannot recover.

The following cases state the law on this point:

Bates v. San Pedro L. A. S. L. R. Co., 38 Utah 568; 114 P. 527.
Moose v. Galigher Machinery Co., 51 Utah 504; 171 P. 153.
Knight v. Southern Pac. Co., 52 Utah 42; 172 P. 689.
O'Brien v. Alston, 61 Utah 368; 213 P. 791.
Dolley v. Mid-Western Dairy Products Co., 80 Utah 331; 15 P. (2d) 309.
Bullock v. Luke, 98 Utah 501; 98 P. (2d) 350.

(d) Respondent assumed the risk of the ordinary and obvious dangers incident to her work.

Dingman v. Mattock Co. (Cal. 1939) 96 P. (2d) 821.
Benjamin v. Nernberg (Pa. 1931) 157 A. 10.
Branchi v. South Park Presbyterian Church, et al, (N. J. 1939) 8 A. (2d) 567-571.

For these reasons this court should review the decision of the Circuit Court.

4

The fourth point petitioner relies upon in support of its petition is that as an University, almost entirely supported by funds appropriated to it by a church organization and endowments from individuals, it is entitled to exemption from liability in this case.

The reasons for this position are these:

(a) That as stated by Judge Phillips in his dissenting opinion the law of Utah exempts petitioner under the facts set out in this record (R. 142).

An analysis of the second Dee Hospital opinion by Justice Moffatt clearly demonstrates that he has limited the law of that case in its application to a case such as this.

In proceeding to the determination of the issues Justice Moffatt frames this question:

> "When an institution, association, person, or corporation undertakes by contract for pay to perform a specified service, such as set out in the plaintiff's complaint, may the defense of a 'charitable' shield, as against a pleaded and admitted negligence, be invoked?"

The judge then goes on to state that with this question in mind the next question is: "Does the complaint, the allegations of which have been summarized, state a cause of action?" Then after further comment in which he discusses the question of whether charitable institutions are exempt from liability he submits a third question in this form: "But why should a charitable institution be excepted?" and then in answer quotes from "Perry on Trusts" as follows:

> "'It is almost universally held that those who are receiving the benefits of the charity, for example, patients, at a charitable hospital or pupils at a school or college which is a public charity, cannot recover from the corpora-

> tion or from the trustees for injuries due to the negligence of an employee, where it does not appear that there was negligence in selecting the employee.' Vol. 2, 7th Ed. section 745."

If we understand his decision up to this point it is to the effect that those receiving the benefits of a charity cannot recover from the charity for injuries received except for negligence in selecting the employee. He appears to emphasize that point later on in his decision where he says, "It is, however, generally held that, as to beneficiaries, if the charity had exercised due care in the selection of its servants, the recipient of the charity may not recover in an action against the charity." In the next paragraph of his opinion he states the question to be "as to whether the complaint states facts sufficient to constitute a cause of action in negligence for a service undertaken on contract for pay notwithstanding that, internally it (the institution) may be classed as a charity," but at the same time by its articles may sue and be sued and receive patients for and collect compensation from them.

He then submits the fourth question. "Is it (the charitable institution) exercising a charitable function as a matter of law under the facts stated?" Then he quotes from the articles of the hospital and follows with this query which is quoted from a previous decision in this same case: "Does the contract for pay take the institution out of the protection of the rule, *or, in so far as the contract for pay is concerned*, make the institution a business institution not subject to the charitable immunity?" After further consideraion of various questions he concludes:

> "Put otherwise, where a contract involves an agreement to perform a service for compensation or pay, although the general purposes of the actor may be charitable, yet, in the particular instance the general character or purposes of the actor may not without more be invoked as a defense as a matter of law against actual negligence,

whether pleaded in the complaint or by way of answer or defense."

At this point, as we understand the court, he has apparently reached this conclusion, that the hospital in question is a charitable institution. Next, the court seemingly holds, that where the party injured was received as a pay patient and compensation paid for him he is not cut off from recovery. But going on in his opinion the court, as if having in mind our very case, states this exception to the rule he has arrived at up to this time: *"There are combinations where the contract for service so predominates as to justify the conclusion that the actor was performing a pure charity."* Our contention is that in this case petitioner paid so little for what she got that the "service so preponderates (over what she paid) as to justify the conclusion that the actor (the University) was performing a pure charity."

There is one other point invoked in the decision of the second Dee Hospital case that this court should be advised of. It is this:

Justice Moffatt, in writing his decision, relied strongly upon the decision of the Idaho Supreme Court in *Henderson v. Twin Falls County*, 56 Idaho 124, 50 P. (2d) 597, 101 A. L. R. 1151. This case was one involving the operation of a county hospital where the Idaho Supreme Court held that one injured in the hospital might recover from the hospital. At the time the Dee Hospital case was pending in the Supreme Court in Utah there was pending in the Supreme Court of the State of Idaho the case of *Wilcox v. Idaho Falls Hospital*, 82 P. (2d) 849, involving the same question as was involved in the Utah case, the Idaho Falls Hospital being operated by the Church of Jesus Christ of Latter-day Saints. After the Utah Supreme Court had handed down the decision in the Dee Hospital case, basing its judgment upon the Twin Falls County hospital case as support for its throwing over the eleemosynary exemption rule, and Justice Wolfe in his concurring opinion going so far as to list Idaho as one of those states that had repudiated said doctrine, the Idaho

Supreme Court apparently without knowledge of the Utah case, handed down its decision in the Idaho Falls Hospital case granting exemption from negligence. In that case the Idaho court distinguished the Twin Falls County Hospital case and sustained the rule of exemption to the Idaho Falls Hospital as an eleemosynary institution. When the Utah decision was brought to the attention of the Idaho Supreme Court upon a motion for a rehearing, that court granted a rehearing in the Idaho Falls Hospital case but after the rehearing was had and the Utah case considered by it, the court affirmed its previous judgment that so far as Idaho was concerned the rule of exemption from liability in such cases was still the law of that state.

An illuminating discussion of this very situation appears in an article in the Insurance Counsel Journal for October, 1939, at page 23.

(b) All decided cases, both state and federal, apply the rule of exemption to institutions in cases like the one at bar.

> Hamberger v. Cornell University, (N. Y.), supra.
> Parks v. Northwestern University (Ill.), supra.
> Ettlinger v. Trustees of Randolph Macon College, supra.
> Higgins v. Pratt Institute, supra.

(c) To permit this decision to stand will submit petitioner and such institutions as petitioner to innumerable claims and probable losses at a time when their respective incomes are greatly reduced by lack of earning power on the part of their assets.

IV

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order to relieve petitioner of the injustice imposed upon it by the judgment as it now stands, and that to such an end a writ

of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Tenth Circuit and finally reverse it.

ROBERT L. JUDD,

PAUL H. RAY,

S. J. QUINNEY,

Counsel for Petitioner.

A. H. NEBEKER,

Of Counsel.